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May 13, 1994

BY HAND

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

RE: Amendment of Sections 73.3526(d) and
73.3527(d) of the Commission's Rules:
Location of Public Inspection File

Dear Mr. Caton:

Enclosed please find the original and four (4) copies of a Petition for Rulemaking for filing with the Commission in connection with the above-captioned.

If you should have any questions regarding this matter, kindly direct them to the undersigned.

Yours truly,


Marjorie R. Esman

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Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In re)
Amendment of Sections)
73.3526(d) and 73.3527(d))
of the Commission's Rules:)
Location of Public Inspection File)

To: Chief
Policy and Rules Division

PETITION FOR RULEMAKING

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May 13, 1994

SUMMARY

The law firm of Hardy & Carey, L.L.P. Petitions for Rulemaking to amend the Commission's rules concerning the location of a broadcast station's Public Inspection File, to specify that the Public File must be maintained at the main studio of the station. Hardy & Carey submits that the rules concerning the location of the Public File have not been reviewed in many years, and circumstances have changed since their most recent review. Now that a station's main studio may be located anywhere within its principal community contour the public is not regularly or reliably informed as to the location of a Public File. Arizona Waivers, formerly issued to allow some stations to locate main studios outside the community of license, allow those stations to maintain a Public File outside the community of license. The public has no way of knowing what stations have Arizona Waivers and what stations do not. There is no requirement that the public be regularly informed of the location of a Public File or of a new location if the file is moved. In addition, current circumstances in the United States are such that a main studio located in an urban area may be more accessible to residents of a community of license due to commuting patterns and work habits.

Like the public, political candidates cannot know the location of the station's Public File and may be harmed rather than merely inconvenienced if the public file is located away from the main studio. To further the interests of political candidates, the Public File should be available for inspection at the main studio where the candidate is most likely to go.

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In re)
Amendment of Sections)
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of the Commission's Rules:)
Location of Public Inspection File)

To: Chief
Policy and Rules Division

PETITION FOR RULEMAKING

The law firm of Hardy and Carey, L.L.P. ("Hardy & Carey"), individually and on behalf of its clients, petitions the Commission to amend Sections 73.3526(d) and 73.3527(d) of its Rules (47 CFR §73.3526(d) and §73.3527(d)) and any related rules, to delete the requirement that the Public Inspection File ("Public File") of a broadcast station, where the studio is not located in the community of license, be located "at any accessible place (such as a public registry for documents or an attorney's office)" in the community to which the station is or is proposed to be licensed.¹ In support, Hardy and Carey shows as follows:

¹Hardy and Carey represents a number of broadcasters and is regularly engaged in giving advice concerning the location of Public Files. Hardy and Carey is an "interested person" pursuant to §1.401(a) of the Commission's Rules because it must interpret those rules for its clients and provide advice. In addition, its members and employees are members of the public who can and may wish to view the contents of Public Files.

I. BACKGROUND

The present requirements concerning the location of the Public File have not been altered in many years. By Report and Order, 2 FCC Rcd 3215 (1987) ("Public File R&O"), the Commission amended Section 73.1125 of its rules to permit broadcast licensees to maintain "a main studio within the station's principal community contour." However, in the Public File R&O the Commission expressly declared that a local Public File must be maintained in the community of license "to assure meaningful public participation in our licensing process." 2 FCC Rcd 3218.

Nonetheless, despite this declaration, the Commission acknowledged that for almost two decades it had allowed certain licensees to operate with Public Files outside the community of license pursuant to waivers granted under Arizona Communications Corp., 25 FCC 2d 837 (1970), reconsideration denied 27 FCC 2d 283 (1971) ("Arizona Waivers"). These licensees have continued to be exempt from the requirement of maintaining a Public File within the community of license, and they may maintain the file at the station's main studio wherever it is located. Their listeners, therefore, have been deemed "assure[d] meaningful public participation" in the Commission's licensing processes even without a Public File located in their communities of license.

While some but not all stations must maintain their Public Files in the community of license, the Commission has not evaluated these rules, or the policies that underlie them, since 1987. It has not ascertained whether the public is in fact served by the requirement that some (but not all) stations maintain their Public Files in their communities of license.

The Public File R&O acknowledged changes that had occurred prior to 1987 in the production of radio programming and in the role of the main studio. It noted that changes in the marketplace, as well as changes in communication and travel patterns, are such that residents no longer require a studio in the community of license in order to maintain contact with a licensee. Specifically, the Public File R&O declared as follows:

The record in this proceeding also demonstrates that a studio in the community of license is no longer required to assure that a station is physically accessible to residents. ... travel time has been reduced in many areas due to the growth of modern highways and mass transit systems. A studio located outside a community may be as accessible to residents as a facility within the community. (Emphasis supplied)

2 FCC Rcd 3218, paragraph 32.

Hardy and Carey maintains that changes in the United States, and the arbitrary and capricious effect of the Arizona Waivers require, a modification of the rules concerning the location of the Public File. Commuting patterns and public expectations have changed since 1987 such that the Public File no longer must be located in the community of license to ensure meaningful public

participation in the Commission's licensing process. Broadcasters can serve their communities well, as they do with main studios, with the Public File located elsewhere.

II. THE PUBLIC IS NOT SERVED BY THE EXISTING REQUIREMENT

A. Members of the public do not know the location of the Public File.

Commission rules do not require licensees to notify the public of the location of Public Files except under certain limited circumstances. Section 73.3580 requires provide public notice of certain applications, including a notice that specified applications are on file at a specified location. This rule applies to renewal applications, and therefore public notice is required at least once within each license term of the location of each licensee's Public File. However, if a licensee does not file an application specified in Section 73.3580 during a license term, the public need not be notified of the location of the Public File.

Moreover, Commission rules do not require licensees to inform the public if the Public File is moved during the license term. A licensee can change the location of its Public File shortly after its renewal application is filed, and provide no public notice of the new location until either the end of the license term or until an application is filed under Section 73.3580.² For television stations, this means

²A licensee may move its Public File for many reasons beyond its control. A public library may change locations; the attorney responsible for the file may move offices; a file's custodian may refuse further responsibility for it

that the public may not be notified for five years of the location of the Public File, and for radio stations the delay may be seven years.

Under those circumstances, the public has no basis to assume that the Public File is located anywhere other than the main studio of the station. The location of the main studio is readily ascertained by means of the telephone book, which is updated at least once each year (twice in urban areas where White Pages and Yellow Pages are updated on different schedules). The only address a member of the public has for a broadcast station is the address of the main studio listed in the telephone book, and it is that address to which a member of the public normally and naturally will go.

Because Section 73.1125 of the Commission's Rules now permits a main studio to be located anywhere within the station's principal community contour, a powerful station may have its main studio some distance from its community of license. A visitor who seeks out a station at its main studio, the only known address, is not served by there being told that in order to view the file (which is supposedly generally available) the visitor must travel to another community which may be as much as an hour away by car.

Indeed, an off-premises location may actually dissuade inspection of the Public File. Technically, the file can be placed at a business in an unsavory neighborhood with no nearby parking and poor public transit access, and remain

in compliance with the rules.³ Obviously, the public is better served by having the Public File located at the main studio which, as a business regularly dealing with the public, is more likely to be safely accessible.

B. The public cannot know what stations operate pursuant to Arizona Waivers, and the rules are arbitrary and capricious as applied.

As noted, licensees which obtained Arizona Waivers prior to July 16, 1987 presently maintain their Public Files at the main studio, outside the community of license. A member of the public cannot possibly know, without extensive research, which stations operate pursuant to such a waiver and which do not. Although the public may know a station's community of license through required station identification announcements, that alone is not sufficient to reveal the location of the Public File because of the Arizona Waivers. Even station identifications no longer reliably disclose the community of license, because they may now include the name of "any additional community or communities." Section 73.1201(a)(2). Therefore, there is no reliable public notification of the the community of license or the location of the Public File.

Because of the existence of Arizona Waivers, the public cannot rely on any information it may have about a station to ascertain the location of a Public File.

³In addition, a licensee, despite its best efforts, cannot control the placement of documents in the Public File if the custodians are not the licensee's employees. It therefore cannot ensure that the Public File is maintained in a way that serves the public interest.

In order to know the proper location of the Public File, a member of the public must obtain esoteric, sometimes old and possibly unavailable information from an unfamiliar and inaccessible source: the Commission itself. From the perspective of the public, which does not know the Commission's rules, does not know what station is licensed to where nor who has an Arizona Waiver (or even what such a waiver represents), to permit some stations to keep a Public File outside the community of license while requiring others to maintain a file within it is arbitrary and capricious and serves no useful purpose. This is particularly true because the Commission has already determined that the public can have meaningful participation in its licensing process if some Public Files are kept outside the community of license.

C. The main studio may be more accessible to residents of the community of license due to commuting patterns.

The requirement that the Public File be kept in the community of license is based on the Commission's untested assumption that it is more convenient for residents of that community to have the file located there. This, in turn, assumes that residents of the community of license are themselves located in that community during normal business hours when the Public File must be made available. While this may have been true 40 years ago, it is no longer the case. Many communities of license, formerly small isolated communities, have become suburbs and "bedroom communities" of larger cities. The traditional family pattern

of employed husband, stay-at-home wife, and children living in a small community has now been relegated to the history books. The Commission is surely aware that the majority of American households now deviate markedly from this pattern: in most households, all adults are employed outside the home, usually in urban areas. To the extent that a Public File may be located in a suburb where residents spend little time during business hours, that Public File is not accessible to the public in any meaningful way.⁴ As the Commission recognized in the Public File R&O, many stations have located their main studios in urban areas to be closer to their listeners and their advertisers. To busy, employed, commuting residents of smaller communities, the Public File is far more accessible if located close to their place of business, which is more likely to be in an urban area than in a smaller outlying community. Broadcasters, like the public they serve, understand that the community of license may not be the most convenient location to provide a service during business hours. The Commission should alter its rules to conform with present-day realities.

III. THE PRESENT RULES DISERVE POLITICAL CANDIDATES

A. Candidates, like the public, cannot know the location of a station's Public File

Sections 73.3526(a)(4) and 73.3527(a)(4) of the Commission's rules provide that the Public File must include "[s]uch records as are required to be kept by

⁴The Commission's rules require the Public File to be made "available for public inspection at any time during regular business hours." Sections 73.3526(d); 73.3527(d).

§73.1940 concerning broadcasts by candidates for public office," otherwise known as the "Political File."⁵ The Political File contains the records of requests from and rates charged to political candidates and their authorized representatives pursuant to Section 73.1943.⁶ The Commission has declared that the Political File is necessary, among other things, "to determine whether a station is affording equal opportunities and whether the candidate is getting favorable or unfavorable treatment in the placement of spots." Report and Order, 7 FCC Rcd. 678 (1991) ("Political File R&O"), Paragraph 124. For candidates to avail themselves of this opportunity, provided by the Communications Act, they must know where the Political File is located.

Like the general public, a political candidate cannot know the location of the Political File except by identifying the location of the main studio. Unlike the general public, a political candidate may have an immediate need for the information contained in the Political File. Because of the pace of many election campaigns, a candidate may need to know information about rates and requests on

⁵Section 73.1940 no longer addresses broadcasts by candidates for public office. The rule specifying a "Political File" is now 73.1943.

⁶The Commission's rules concerning political broadcasting are governed by Congressional mandate, 47 USC §312(7), which requires broadcasters "to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy."

short notice. Under the circumstances, a candidate may be harmed and not merely inconvenienced by visiting the wrong, albeit logical, location.

In addition, most elections cover territories larger than the community of license itself. Only small local elections such as those for Mayor and local city or town council are restricted to the community of license. Candidates in larger races, including most Federal elections, usually advertise on many stations that cover their districts, without regard to esoteric categories such as "community of license" of which the candidate, like the general public, is unaware. To keep informed, a candidate or representative may visit many stations in the course of a day to view the Political Files. For the candidate to travel a long distance to view a single file, when the station's main studio may be located in an urban area near the studios of many other stations, is inconvenient and does not promote the purposes of the Political File. Indeed, it may even discourage candidates from viewing a Political File too remotely located.

B. Licensees cannot comply with the Political File rules if the Public File is not at the main studio

In recognition of the importance of the Political File, the Commission has stated that records must be placed in that file "immediately absent unusual circumstances." Political File R&O, Section 73.1943(c) of the Commission's rules. The Commission has never explained what it means by "unusual circumstances," which may or may not extend to a remote Public File. If, however, the

Commission were not to consider a Public File located elsewhere than the main studio to be "unusual circumstances," a licensee with such a file, operating in accordance with Commission requirements, would be unable to provide "immediate" placement of political records.

As noted, some main studios are now located at a distance from the community of license. In most cases, the sales office, where inquiries from political candidates are handled, is located at the main studio. Under those circumstances, a licensee at best would have a considerable delay in placing documents in the Political File, even assuming that the licensee had regular courier service to the Public File operating at all times throughout the day. Such service is inefficient and not cost effective, and is not in the interest of the public, political candidates, or broadcasters who must, as the Commission has acknowledged, be concerned with economies of scale in order to survive in the current economic climate. Report and Order, 7 FCC Rcd. 2755 (1992), Paragraphs 10-11 ("Multiple Ownership R&O").

As a result, because they must expend limited resources on programming to better serve the public interest (Multiple Ownership R&O), broadcast licensees typically update their Political Files daily. To a candidate who may wish more frequent updates, this may not provide the "immediate" information contemplated by the Commission's rules. Yet the licensee is unable to provide the information "immediately," due to the requirement that the file be placed in a remote location.

Consequently, neither the candidate nor the licensee is served by the requirement that the Political File be located away from the main studio.

IV. CONCLUSIONS

Hardy and Carey submits that the current requirements for the location of the Public File are obsolete, do not serve the interests of the public, political candidates, or licensees, and are arbitrary and capricious as applied. Changes in the broadcast industry, as well as changes in commuting patterns, mandate that licensees should maintain their Public Files at the main studio wherever located, to ensure predictability, reliability, and convenience.

IN VIEW OF THE ABOVE, Hardy and Carey request that Sections 73.3526(d) and 73.3527(d) of the Commission's rules be amended to state:

(d) Location of Records. The file shall be maintained at the main studio of the station. The file shall be available for public inspection at any time during regular business hours.

Respectfully Submitted,

By: 

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